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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1041

MT. SINAI HOSPITAL OF GREATER MIAMI, INC.,
Petitioner
v.
FORREST D. MATHEWS, Secretary of Health, Education, and Welfare, and BLUE CROSS OF FLORIDA, INC.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

BURTON A. SCHWALB
STEPHEN L. GIBSON
ARENT, FOX, KINTNER, PLOTKIN & KAHN
1815 H Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner Mt. Sinai Hospital of Greater Miami, Inc.

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The following is in reply to certain new matters raised by the Respondents' Brief in Opposition.

ARGUMENT

I. Respondents' Concession as to 42 U.S.C. 1395f(a)(7) Is, In Effect, a Confession of Error.

In their Brief in Opposition, Respondents, for the first time in this entire litigation, have attempted to

come to grips with Sec. 1395f(a)(7). In so doing, Respondents have conceded the significance of that section, which concession is, in effect, a confession of error.

Until now, Respondents have ignored Sec. 1395f(a)(7) and have argued simplistically and superficially as follows: (1) no payment may be made for medically unnecessary services because of Sec. 1395y(a)(1); (2) if a payment is made for an unnecessary service, it is an "overpayment"; (3) although Sec. 1395gg(a)(1)(A) provides that Medicare payments are deemed to have been paid to the patient, "overpayments" are to be deemed to have been made to the hospital; and (4) all "overpayments" may be recouped from the hospital, without limitation as to time or amount, under the theory of common law recoupment or under Sec. 1395g. In view of Sec. 1395f(a)(7), Respondents now effectively concede that this argument proves too much and is therefore wrong.

Sec. 1395x(k)(4) required a hospital's in-house utilization committee to screen the hospital services and notify both the hospital and the physician if it deemed the hospital stay or certain services to be unnecessary. Even if the hospital stay was then unnecessary, the hospital was still to be paid the reasonable cost of services actually rendered to an eligible beneficiary, not only for the time up to actual notice but also for a three day grace period thereafter, during which grace period the services could be terminated with the patient's and the physician's approval, or alternative payment arrangements could be made. What is of critical significance is that Sec. 1395f(a)(7) provides for a hospital to be paid, even for

medically unnecessary services, until it has notice and a subsequent grace period. This is not shocking since there is no evidence that Congress intended hospitals to bear the risk of a retroactive judgment or the medical necessity of a physician's instructions.

On page 10 in footnote 11 of its Brief, Respondents concede that, under Sec. 1395f(a)(7), payments for unnecessary services, prior to notice and the expiration of the grace period, are *not* "overpayments" under the Act; in this regard, that footnote states:

> * * * Although that provision [*i.e.*, Sec. 1395f (a)(7)] may bar recoupment of particular payments made with respect to certain unnecessary services, by preventing such payments from being treated as overpayments under the Act, it obviously does not affect the Secretary's right to recoup overpayments not so protected.

Admittedly then, to use Respondents' words, payments for Sec. 1395f(a)(7) services are "protected" against recoupment since they are not "overpayments."

In the case at bar, none of the $6.38 million includes payments made after such notice and grace period. To the contrary, all the payments in issue for the July 1, 1966 to December 31, 1971 time period (first questioned after 1971) are protected under Sec. 1395f (a)(7). Under Respondents own concession, therefore, there are no "overpayments" subject to recoupment, and that should dispose of this case. The only way in which the decision below can legitimately stand is to assume that every dollar paid for an unnecessary service may be recouped, because that is what Respondents argued below and what that Court held.

It would be absurd, however, to have a situation where the Respondents now admit that some (all in this case) payments are "protected" against recoupment, while arguing that the decision below subjects all such payments to recoupment.

2. Respondents' Position Compounds the Uncertainty as to the State of the Law.

Notwithstanding the fact that both Courts below held that Sec. 1395g permitted recoupment of only those "overpayments" resulting from year end cost accounting audit adjustments, Respondents continue to argue that it also permits recoupment of "overpayments" due to payments for unnecessary services. (Br. p. 6, fn. 4.) Sec. 1395g provides for payment "adjustments of previously made overpayments or underpayments", in the context of interim estimates of reasonable cost. Even if this section envisioned overpayments because of unnecessary services (as opposed to merely adjusting the year's costs attributable to covered services), Respondents have admitted that Sec. 1395f(a)(7) prevents the payments to Mt. Sinai from being treated as "overpayments." How then can Sec. 1395g apply; can a payment be not an "overpayment" for Sec. 1395f(a)(7) purposes but be an "overpayment" for Sec. 1395g purposes? Can it be protected from recoupment under one section but still be subject to recoupment under another section or common law? This confusion results from Respondents recognizing that Sec. 1395f(a)(7) prevents certain payments for unnecessary services from being considered recoupable "overpayments" while simultaneously and inconsistently urging that the decision below stand even though it held that *all* payments for

unnecessary services are "overpayments" subject to recoupment.

The confusion is compounded when Respondents quote from Sec. 1395gg(b)(1) which relates to situations where more than the "correct amount" is paid (Br. p. 8), and then sum up by arguing for a common law right to recoup "erroneous payments". (Br. p. 11.) Throughout their Brief, therefore, Respondents refer to "protected overpayments", "overpayments not so protected", "overpayments" without definition, payments in excess of the "correct amount" and "erroneous payments", which is not a statutory term. Where in all of this terminology do the payments to the many hospitals in Mt. Sinai's situation fall? This free wheeling and interchangeable use of statutory and non-statutory terminology, coupled with Respondents' position on Sec. 1395f(a)(7), leave totally in chaos the state of the law regarding Respondents' enforcement rights and the ability of hospitals to rely on past payments and approvals. If Respondents' position on Sec. 1395f(a)(7) is not, in effect, a confession of error, then we are left completely at sea as to what these various terms mean in the statutory context in which they appear.

This confusion affects not only all pre-1972 Medicare payments, which are forever open to question under the decision below, but also the administration of the law after the 1972 amendments. For example, neither Sec. 1395y(a)(1) nor Sec. 1395g was amended in 1972, and Respondents argue (Br. 11) that Congress did not intend to abrogate the common law right to recoup "erroneous payments". Still open, then, is the question of whether Respondents' term "errone-

ous payments" includes payments for unnecessary services which are not "overpayments" under Sec. 1395f(a)(7). Still another uncertainty is the notion of "fault" which, Respondents assert, Congress "evidently" legislated as a condition to recoupment; the use of the term "evidently" indicates a basic uncertainty, which uncertainty flows from Respondents adherence to its basic proposition that Secs. 1395g and 1395y(a)(1), plus the common law, combine to permit recoupment, notwithstanding other provisions of the Act indicating the contrary. And since Respondents expressly stated that they intend to pursue the same course of action for 1972 and thereafter, it cannot be said, as Respondents argue (Br. p. 9, fn. 8), that the issues here lack prospective importance.

3. The 1972 Amendments to 42 U.S.C. 1395cc(a)(1)(B) and to the Medicaid Act Do Not Nullify 42 U.S.C. 1395f(a)(7).

Respondents' reliance on Sec. 1395cc(a)(1)(B) assumes rather than proves their conclusion. (Br. p. 9) If, as Respondents suggest, Congress provided in 1972 for a "fault" standard of recoupment (Br. p. 11), then it is not surprising that it also provided for time limitations and for a hospital's rights over against patients. These amendments do not *per se* answer the questions of whether a right to recoup from a hospital on issues of medical necessity was made available in 1972 under a fault standard or whether a right was impliedly present without limitation since July 1, 1966.[1]

[1] It should be kept in mind that these 1972 amendments were enacted with, and should be read in the context of, the PSRO provisions relating to utilization.

Nor is Respondents' reference to the 1972 *Medicaid* amendments supportive of their position. (Br. p. 9, fn. 9.)[2] Those provisions do not acknowledge a then existing right in Respondents to recoup on the basis of medical necessity; they do no more than provide that *if there is a right* to recover Medicare funds on some basis, then Respondents may withhold Medicaid payments from a state.[3] The reference to the Medicaid Act, therefore, merely begs the question of when and under what circumstances Respondents may question the medical necessity for services *vis-a-vis* a hospital as opposed to a physician who prescribed the services or the patient. Certainly these amendments do not impliedly repeal Sec. 1395f(a)(7).

4. The District Court's Decision and Subject Matter Jurisdiction.

Respondents unfairly capsulize and depict the District Court's decision as being based solely on the reasoning that: "Congress had expressly authorized recoupment of payments in excess of 'reasonable cost' of the services rendered [*i.e.*, Sec. 1395g] and therefore must be presumed to have withheld authorization to recoup other erroneous payments * * *." (Br. p. 5.) To the contrary, the District Court's decision was based on far more elaborate reasoning than this, reflected by the following comment by that Court (Pet. Supp. App. 56a):

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[2] This is cited as 42 U.S.C. (Supp. IV) 1396b(j)(2)(B)(i) but Respondents seemingly are referring to Sec. 1396b(l)(2)(B)(i).

[3] The overpayment referred to, in the context of other provisions of the Act, is one based on the year-end determination of actual reasonable costs, not on retroactive changes in judgments as to medical necessity.

> Nonetheless, upon careful consideration of the entirety of the Act, the Court is persuaded that the suspension regulations are fundamentally at odds with the intent of Congress as it is manifested by the totality of the statutory scheme.

Nor does Mt. Sinai agree with Respondents' version of the facts, which version is taken from Respondents' self serving and argumentative letter sent when suit was filed and never subjected either to discovery or trial.[4]

It is true that Respondents argued subject matter jurisdiction in the District Court, as well as a number of other points including the dilatory objection to actual personal service of the complaint on the theory that the Florida superintendent or commissioner of insurance should have been served instead. In any event, subject matter jurisdiction was not raised in the Court of Appeals nor do Respondents argue it here beyond the oblique reference to *Weinberger* v. *Salfi*, 422 U.S. 749. (Br. p. 5, fn. 2.) *Salfi* is clearly distinguishable since there the claimants had express administrative and judicial review procedures available under 42 U.S.C. Sec. 405(h); in the case of hospitals under Medicare, no such procedure is provided. In fact, Respondents have always contended that a hospital is not entitled to the procedures otherwise available to patients under 42 U.S.C. Sec. 1395ff and 20 C.F.R. 405.701 *et seq.*[5] While this Court may raise

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[4] As one example, Respondents' assertion (Br. p. 4) that immediate suspension of payments was necessary to protect Medicare against financial loss was rejected by the District Court when it granted an interlocutory injunction.

[5] See Citation p. 23, fn. 17 for Respondents' position on the administrative rights of a provider.

the issue of jurisdiction *sua sponte*, it is not an appropriate issue here and *Salfi* is inapplicable. See also *Mathews* v. *Eldridge*, 424 U.S. ——, decided February 24, 1976.

CONCLUSION

A writ of certiorari should be issued to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

BURTON A. SCHWALB
STEPHEN L. GIBSON
ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1815 H Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner
Mt. Sinai Hospital of
Greater Miami, Inc.